

spectrum reallocation. Examples of interactive video services, HDTV, mobile satellite use, wide band data transmissions, location monitoring services, and many others are in constant view in trade journals and many a stock prospectus. Regrettably absent in these articles are any cost/benefit analysis to the American public or even to the corporations which claim that such services will be brought to the market through their individual energies. In sum, unfounded claims of pent up demand for services, which cannot be verified employing any logical, scientific method, are often lofted and are unfortunately more often believed or presumed, further fueling the frenzy for reallocation of spectrum. One need only review the history of Radio Determination Satellite Services to see how far entities may go with little more than an alleged patent for a new service.

Finally, the obvious use of the radio spectrum as a source for federal revenue is driving the reallocation process. Saddled with enormous debt, the federal government's quest to balance the budget through spectrum sales in cooperation with bidding companies that will employ the radio spectrum gained by auctions to delay reckoning, has become an unspoken cooperation between debtors seeking a mutual benefit. One debtor, the federal government, seeks revenue generation, or the appearance of revenue generation, and other debtors, publicly-traded companies, will pay at auction to add to their spectrum assets and increase their claims of future services which will be brought to the market.

The threat to the economy created by this cooperation is quite obvious. Since the acquisition of spectrum to delay the demand for profitability by large corporations is only short-

term relief for the larger underlying problem of unprofitability, the government's participation actually facilitates the destabilization of the marketplace. Companies which employ auctions in this manner create greater debt loads on their books and the eventual consequence is felt by millions of shareholders whose purchasing decisions are reflected by the financial analysts who are distracted from an examination of corporate profitability, and instead, focus on the corporate image enhancement that is a byproduct of successful auction participation. Such methods of valuation of stock cause prices to rise arbitrarily, creating an even greater risk of larger losses by shareholders. As the federal government creates, through auction, the impetus for inflated stock prices, it increases the level of harm which will befall investors.

Buoyed by its successes during FY1995, the federal government is seeking to increase its efforts in auctioning spectrum to private entities. However, given the effects that uncontrolled auctions will have on the overall financial stability of the telecommunications marketplace, there is reason for caution. The zeal to raise revenue for the U.S. Treasury must be balanced against the loss to the U.S. Treasury in taxes, as more and more telecommunications companies experience levels of failure, creating large losses for investors which will reduce tax revenues. Although the availability of commodity spectrum is increased, there is no corresponding benefit in profitability of corporations which employ the current valuation techniques for sales of stock. The value of shares becomes increasingly illusory, and the risks associated with investment continue to rise at a dangerous rate.

Meanwhile, the political agenda forwarded by the agency reflects a short-term vision in determining success. The agency appears to be willing to forego long-term revenue generation by creating user fees, i.e. leasing spectrum to commercial users, in exchange for short-term auction revenues. This "sell today what you could lease for many tomorrows" is quite disturbing, particularly when one views the fact that a lease of radio spectrum by the federal government is collection of passive income, without the need to invest many scarce federal dollars into maintaining the leased property. Spectrum leasing would lack the fireworks and charisma of headlines that declare that the agency has collected over \$7 billion in a single auction. It would, however, create revenues that would assist in balancing the budget of the federal government for years to come in amounts greater than those collected at one time by auction.

### **Demand For Radio Spectrum From Small Business**

Unlike large, publicly-traded corporations, small business does not have access to financial markets to reap investor dollars as a type of second income. The financial health of small business is measured in paychecks, mortgage payments, and rents. If these more pedestrian costs are met and there is sufficient money left over, the small business is deemed successful and its owner achieves some degree of affluence. Debt financing of small business is similarly local in nature, opting for Main Street over Wall Street, most small businesses are begun with either private loans from family members or mortgage debt.

Small telecommunications concerns must concentrate on true profitability, rather than mere image enhancement. The need to achieve true profitability within a shorter time period is seen in many ways. Small business is more conservative in its demand for radio spectrum. Although the commodity nature of spectrum is not lost on small business, the disproportionate regulation of small business versus large business in the use of spectrum, added to the limited resources of small business, requires that each successful small business must take all the spectrum it needs, but limit its appetite to only what it might use.

The cost of warehousing spectrum is too great to enable small businesses to engage in this activity on any grand scale. Although a small business may own a single transmitter which is producing little more than a station identifier to enable it to serve future demand, large corporations will often have dozens of similar stations, and the largest companies may have hundreds of such spectrum placeholders.<sup>10</sup>

This does not suggest that small telecommunications concerns are not profitable. Most are and some have produced large incomes for their owners. However, the approach to spectrum management and profitability is far different when compared to large concerns. Typically, the upper management/owners of large concerns have achieved wealth through sales of stock, not sales of service. The opposite is true for small business.

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<sup>10</sup> A review of the machinations of the largest carriers would reveal that a carrier, seeking to dominate a particular market area on a particular frequency, will file dozens of applications which would result in a wholly duplicative and unnecessary system design if actually constructed. In reality, the applications are filed to chill opportunities for competing carriers in adjacent regions. Small companies cannot afford these kinds of licensing schemes.

The constant need to cover the cost of operations has a dramatic effect on small businesses approach to spectrum auctions. To date, auctions are typically for large, wide-area use of frequency blocks to serve geographic areas that extend across several counties and, perhaps, states.<sup>11</sup> With each auction comes the commitment that the anticipated service will be built throughout the targeted region. Although success at auction might enhance a small business' opportunities in a given market, there exists the concurrent obligation to finance the build out of such systems, often in unprofitable areas. When considering the diversion of small business dollars to payment for radio spectrum at auction, rather than applying those same dollars to the construction of systems and employment of personnel, many small businesses opt out of the auction alternative. The risk of failure in the planning and construction of such systems is simply too great for small business.

Managers' willingness to accept risk in the auction environment is easily determined by and through the financing of participation. Whereas publicly-traded corporations are employing investor dollars, thus spreading the risk over large pools of investors, small businesses take the risk personally with guarantees from owners or private investors. Failure does not equal failure in the sense of publicly-traded corporations. Failure equals personal bankruptcy for the small business participant.

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<sup>11</sup> SBT recognizes that the Commission's rules still allow for smaller auctions to decide among mutually exclusive applications. However, the Commission might wish to consider the obvious outcome if the competing applicants included one large, publicly traded applicant and one small incumbent operator. Since the present rules provide no advantage arising out of incumbency, the small business would be the likely loser in the auction.

Although small business is, therefore, at a natural disadvantage at auction, the FCC has attempted to provide some means of access to auction for small business. Bidding credits and time payments have opened the doors a crack. But these techniques do not solve the difficulties which are created for small business since the effect of the auction will curtail each's ability to continue natural growth and concurrent competitiveness, are not solvable by such techniques. The use of auctions in their present configuration is then a threat to the future existence of small business, rather than the opportunity it is sometimes touted to be.<sup>12</sup>

That the FCC's efforts to involve small business in the newly created auction process has been a failure is obvious. A review of the FCC auction records would quickly show that small business actually pays more for spectrum at auction than large, publicly-traded corporations.<sup>13</sup> The reason is simple. A small business bidder is more likely to draw competing bids from those entities which quickly recognize that in the auction battle, the small business participant has limited arms. Like table stakes poker, large companies raise the bet against small companies, thereby "buying the pot." At the same time, large companies scare off competing bidders at auction who presume that the larger entity is both willing and able to continue the bidding to enormous levels. The net result of these natural strategies has been an increasing concentration

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<sup>12</sup> The Commission can take no bows for its performance in auctioning the Block C PCS spectrum. The methods employed were so loose that anyone claiming to be a small business could have employed the entire resources of Citibank as long as they met the agency's window dressing standards.

<sup>13</sup> This is confirmed by a review of the auction results for both 900 MHz SMR systems and the Block C auctions for PCS spectrum. In each instance, small business operators paid more.

of spectrum in the hands of the largest entities which pick off the small businesses' channels first.

The concentration of radio spectrum in the hands of only the largest entities through auction, combined with the loss of future business opportunities by small business as a result of auction losses, is eroding the competitiveness of small business. This effect is even more pronounced when the auction is for spectrum which is already fully occupied and used for the delivery of services by small business.

For example, in Docket 93-144 the Commission has adopted the creation of blocks of spectrum at 800 MHz for operation of wide-area systems. Existing 800 MHz operators which do not participate in the auctions or which are unsuccessful at auction, will forever be forced to remain at the same location, with the same number of channels, with no further opportunity to expand their systems. And while penned into a specific location, the newly adopted rules would allow the auction winner, which competes directly with the affected 800 MHz SMR small business, to force frequency migration between the entities, creating contiguous blocks of spectrum for the auction winner's future use. Accordingly, the proposed auctions are to sell occupied spectrum *and* the competitive future of hundreds of small businesses.

In effect, the Commission's actions in Docket 93-144 create a new, arbitrary barrier to entry for small business, including incumbent operators of small businesses. The Commission's actions ignore the Capital Test, by assuming that a small business which might afford to

participate in auctions can concurrently afford to relocate existing operators, construct a wide-area system (Local Test) and is likely to derive a true profit from so acting (Profit Test).<sup>14</sup> SBT hereby avers that the Commission's actions fail all three tests and is, therefore, anti-small business in each regard. That the Commission has advocated a similar effort for paging channels is equally disturbing.

SBT states that channels obtained by small business are far more likely to be employed for the provision of services to the public than the huge spectrum blocks demanded by larger concerns. Small business demand for spectrum is a logical byproduct of public demand for services, not private demand for commodity spectrum to be warehoused on the bottom line of a corporate prospectus. It is, therefore, a healthy appetite reflecting true economic growth.

It is of primary importance for the agency to recognize the differing approach to spectrum demand from small carriers versus large. Without an objective appreciation of the market dynamics, including the methods employed for increased sales of stock and positioning for mergers, the Commission will be ill-equipped to counteract the effects on small business created by this environment, which continues to erect market barriers. In a race to obtain spectrum, the small business operator is presently at a distinct disadvantage, in large part created by the agency's failure to take tangible steps toward assuring the perpetuation of this important market segment. Instead, the agency has continued to employ ineffective methods of

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<sup>14</sup> SBT respectfully states that the alleged "consensus" plan forwarded by AMTA and Nextel and SMR-Won cannot meet this simple three-prong test and, in fact, fails all three.



encouraging participation in auction by small business, which are easily perverted by larger companies.

### **The Barriers To Entry Created By Spectrum Warehousing**

As large companies' appetites are whetted for greater amounts of commodity spectrum to load onto the corporate books, the tendency to warehouse spectrum is evident. Tens of thousands of applications are filed with the agency each year for radio systems that will not be built. However, the appearance of these applications on the Commission's data base precludes other applicants from applying for use of the frequency within a protected area around the proposed location of the radio facility shown on the application. The applications are, therefore, filed not as a reflection of the true business strategies and future development of the filing concern, but as a method of blocking other, competing, companies from seeking the same channel and to add spectrum inventory to the corporation's books.

Never before in the history of telecommunications regulation has there existed so much spectrum warehousing. One reason has been the agency's willingness to grant extended implementation schedules to companies which claim that their grand plans will require additional time to construct over large geographic areas, therefore, these companies request up to five years to construct the facilities for which the licenses have been granted. These requests are often not supported by logic or responded to by the agency's willingness to force companies to apply only for such spectrum that can be constructed within the typically mandated construction period. The public bears the risk that these companies' covenant to build will be met. The

large, national company which fails to construct in a timely manner does not lose its license or its opportunity, and the agency has been quite lax in even determining whether such construction timetables have been met. Nor does the agency "punish" those companies which do not construct even within extended construction periods.<sup>15</sup> However, when it comes to small business, the Commission continues to send eight and twelve-month "construction letters" to small business and continues to "take back" unconstructed facilities.

Further exacerbating the problem of spectrum warehousing has been the agency's willingness to accept "bootstrapping" applications. During the construction period, the agency will accept and grant new applications which rely on the originally granted licenses. As the original licenses expire, the new applications take their place, with later grant dates and expiration dates. In this way, companies are able to block continually all competing entities without ever having to construct a facility, and meanwhile continue to maintain their spectrum assets on the company books.<sup>16</sup>

Thus far ignored in the discussion regarding the appropriateness of auctions of occupied spectrum, has been the effect of spectrum warehousing. Since auctions of occupied spectrum place some premium on a party's previous use and occupation of the auctioned spectrum, entities

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<sup>15</sup> See, Petition For Special Relief, requesting that the Commission take such administrative action as is necessary to assure that facilities licensed in accord with the 1991 "Fleet Call, Inc. Waiver" have been constructed in a timely manner.

<sup>16</sup> The Commission need not look farther than the authorizations of some of the exclusive, nationwide 929 and 931 MHz paging licensees to discover evidence of this activity.

which engage in rampant spectrum warehousing of channels which are later auctioned have a substantial advantage over other, non-warehousing, participants in the auction. In fact, where the auction winner would be required to relocate incumbent systems to alternative spectrum, a party which has engaged in substantial warehousing is able to gain an insurmountable advantage.

Again, the adverse effects of spectrum warehousing are unequally applied to small business versus large business. The cost of engaging in wide-spread spectrum warehousing is too great for small businesses. Warehousing requires substantial legal costs, application preparation costs, and engineering costs -- not to mention FCC filing fees. Therefore, spectrum warehousing, although engaged in by nearly all segments of the industry in varying degrees, is primarily a practice for only the largest companies.

The net effects of unchecked spectrum warehousing are numerous and include: (i) a reduction in spectrum available to small companies to expand their service offerings; (ii) a reduction in auction participation and revenues; (iii) an unfair competitive advantage gained via abuses of the agency's application/license processes; (iv) an unrealistic picture of economic health on the books of warehousing corporations, resulting in inflated and illusory stock prices; and (v) the grant of thousands of licenses which do not result in the delivery of service to the public.

Since the FCC records are rife with warehousing that precludes legitimate applications for use of the warehoused spectrum for the delivery of services from small businesses, the

Commission has become a participant in creation of one of the greatest market barriers suffered by small business. The Commission's participation is evidenced in three ways, each which is highly suspect in its treatment of small business.

First, the Commission has granted extended implementation schedules to large corporations which claim a willingness to spend enormous resources to construct huge networked systems. Typically, the period for construction is up to five years. However, SBT is not aware of the Commission's ever cancelling any such authorization for failure to construct either an entire system or any portion thereof. In fact, SBT is not aware of the Commission's having ever performed a comprehensive inventory of these systems to determine whether each licensed facility has been constructed and made operational during the authorized period.<sup>17</sup> Meanwhile, small operators are regular recipients of inquiries from the Commission, asking whether each facility has been constructed within the authorized construction period. SBT does not seek any relief for its members from the Commission's inquiries, but the association does aver that the Commission's unequal treatment of operators is an impetus for spectrum warehousing by large carriers that creates unnecessary and injurious barriers for small operators.

Second, the Commission's records will demonstrate, particularly in the licensing of SMR systems, that the agency has employed an extremely mechanical approach to execution of its

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<sup>17</sup> Had the Commission performed such an inventory, it would be required under its rules to cancel many authorizations granted to large companies. It would also discover that it has denied the U.S. Treasury of many dollars by allowing certain companies to take advantage of their paper incumbency in spectrum auctions.

rules regarding construction of systems by small operators who have not sought extended implementation, rarely granting any extension of time to construct and employing the "finder's preference program" to recover unconstructed channels. This application of its rules has caused the agency to demonstrate an uneven vigilance which favors larger carriers who are more likely to receive grants of additional time to construct a larger system, thereby stretching the cost of construction over longer periods, without any concurrent disadvantage in licensing. The irony is, of course, that these licensing/economic advantages are extended to companies which, by their size and claimed ability to finance such construction, are the ones which have the least demonstrable need for extended construction periods. Is it not more logical to provide extended construction periods for small operators who experience greater difficulty in financing construction than to expend the Commission's favoritism on companies whose very capacity to construct huge systems belies their need for additional time? To date, this contradiction has escaped the Commission's notice in most instances, resulting in advantages for large carriers which have created an even greater impetus for spectrum warehousing during extended construction periods.

Lastly, the Commission's licensing process for large corporations which are covered under the umbrella of extended implementation schedules has allowed for the mass filing of thousands of applications which were not contemplated in the original grant of extended authority. Perhaps the most glaring example of this problem has arisen in the Commission's treatment of Nextel Communications, Inc., which was provided with the ability to employ "footprint" justifications and aggregation of loading to apply for thousands of channels. If a more

exacting application of the Commission's processing rules in equality with those imposed on smaller SMR companies had been applied by the agency, Nextel would not have been eligible to apply for thousands of 800 MHz channels. Thus, the agency's special treatment of Nextel has created a dearth of available spectrum for small operators seeking to expand operations to better serve the public. Meanwhile, the channels granted to Nextel lie fallow, simply awaiting future use in improving Nextel's position at some future 800 MHz auction.<sup>18</sup>

Presently, many small, local operators are starving for new spectrum to serve local demand, while the highly touted nationwide and regional systems are awash in warehoused spectrum. Customers of smaller systems are experiencing busy-outs and other evidence of overloading of local systems. Customers of larger systems have no such problem, unless it arises solely due to the larger system operator's decision not to construct its warehoused spectrum.<sup>19</sup> Yet, the agency's current policies will increase the amount of spectrum for regional and nationwide systems, where customer demand for additional spectrum is weakest, while decreasing the amount of spectrum for local systems operated by small businesses, where demand is highest.

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<sup>18</sup> The Commission has been provided an opportunity to rid itself of the effect of this spectrum warehousing by acting favorably on the Petition For Special Relief filed by Brown and Schwaninger on June 25, 1996.

<sup>19</sup> SBT members explain that Nextel's analog systems in markets like Detroit are also experiencing blockage problems, however, this is due to Nextel's deconstruction of analog channels to encourage customers to switch to Nextel's higher cost digital systems.

The effect of spectrum warehousing creates enormous barriers for small business, choking off entrance and growth by entrepreneurs. And although the Commission's record is passible in identifying instances of abuse by small operators of site-specific systems, the agency's record is abysmal in avoiding abuse by large carriers. It is the agency's unwillingness to enforce, strictly and equally, its rules which has caused these horrendous barriers for small business, whose access to spectrum is constantly endangered by the effects of the agency's inaction in enforcing its rules and its mandate to authorize the use of spectrum for the delivery of goods and service to the public, and not to pad the bottom line of corporate bookkeepers.

### **In Consideration Of Incumbency**

The Commission's policies, shaped around its new auction authority, have diminished the value of incumbency for smaller operators. This fact is particularly true when one includes the possibility that an incumbent operator might suffer forced frequency relocation. The net effect of the newly created risks of incumbency serve as a disincentive to smaller operators to enter a given market or for existing operators to remain in a given market. Indeed, the Commission's failure to provide the full benefit of incumbency to small operators has created an unhealthy impetus for many small SMR operators to exit the business. SBT's surveys demonstrate that small SMR operators exhibit a general belief that the "Commission is out to destroy us." Although SBT is not prepared to join in this belief, the sentiment expressed is wholly understandable.

In its findings in Docket 93-144, the Commission determined that small incumbent operators must not move their systems, expand their systems, add channels or do all of the things that would naturally add opportunity for economic growth and health. Instead, smaller systems were to be frozen in place and in time, to make way for larger operators' systems following auction. These edicts came on the heels of a prolonged application freeze which was unequally applied. ESMR system operators were allowed to continue to file for channel after channel, while smaller operators were told to wait -- initially to allow the Commission to handle a self-imposed backlog of applications and then later to clear the way for auctions. It is without doubt that small business SMR operators have been woefully mistreated at the hands of the agency, which diminishes the value and use of existing systems, and creates an atmosphere of desperation for many operators.<sup>20</sup> The opportunities lost by small operators will be difficult, if not impossible, to recover due to the agency's callous treatment.

Perhaps the greatest injury suffered by small operators in that proceeding was the agency's discounting of the value to competition brought by the operation of the smaller systems. In its actions, the agency dismissed small operators' contributions over the many years, and declared, without justification or a shred of empirical data, that small operators' competitive zeal was not significant or worthy of consideration in the Commission's grander scheme. This "bigger is better" bias acts to undermine the ability of small operators to gain fair opportunity

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<sup>20</sup> Indeed, the actions of those operators represented by SMR-WON are the obvious reaction of an industry under siege, forced to accept what would otherwise be unacceptable terms for the right to simply survive. The Commission should carefully examine the touted "consensus" among SMR operators, since its small business participants are acting under obvious duress.



and, instead, creates a tremendous barrier to further market penetration by small operators. In effect, the Commission is stating that advantages will only be afforded to companies which are already large and well-financed. Those which have not reached this stage in their development have missed the opportunity, which might never come again.

It is of paramount importance that the Commission give greater consideration to the sacrifice of small operators in creating a telecommunications business. As stated above, these entities are created with private money and private risk. It is a far greater display of commitment for a small operator to mortgage his home for the opportunity to provide a valuable service to the public, than it is for a large, publicly-traded corporation to invest some small portion of its proceeds from sales of stock to investors. Yet recently the Commission has adjudged cash collected at auction as the only litmus test in determining levels of commitment. Use of this singular test is a formula for the failure of small business. Despite the enormous commitment which is attendant in risking personal bankruptcy, small operators are deemed comparatively less committed than a large corporation. Accordingly, SBT strongly avers that the auction test is seriously flawed.

In earlier petitions arising out of the auction rules for 900 MHz, the Commission was asked to consider the fundamental fairness in employing auction proceeds in this manner. A petitioner, Pro-Tec Mobile Communications, Inc., suggested a multi-prong test for grant of an exception to participation in auction to obtain a wide-area license for a small business. In sum, Pro-Tec recommended that the Commission grant authority to an entity which was a small,

incumbent, operator on the subject frequencies, operating a system which served at least one-third of the population contained in the relevant geographic area. Such grant would be made without use of auctions. The Commission rejected this idea and opted, instead, to continue to employ auction proceeds as its test. The end result was that the types of small operators for which Pro-Tec sought to protect paid more per activity unit in that auction than any other type of participant, even following the discounting for bidding credits.<sup>21</sup>

That small operators paid more (60% more in most cases) created both a present and future barrier to the markets to be enjoyed via that auction. The present barrier is that small incumbents who could not afford to pay the highest price at auction dropped out. Those that remained and won have reduced their capital to construct systems. And future auctions involving incumbents who are small businesses, will likely suffer from lack of participation by small business who will assume a repeat of the unequal treatment within those auctions.

The Commission's future actions, if it is sincere in removing barriers for small business, must place a premium on incumbency by small business. It is not enough to state the bare assumption that small incumbent operators will enjoy some benefit at auction. Indeed, the benefit is mostly illusory under the present system of bidding credits and extended payments. The Commission must adopt produce policies which insure that small operators who bear the risk of construction and operation receive the full benefit of their actions in future spectrum allocations, auctions and similar licensing activity.

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<sup>21</sup> The lowest prices per activity unit were paid by large company incumbents.

## **Recommendations For Future Spectrum Policies**

1. A more judicious use of auctions, following a comprehensive examination of alternative licensing methods.
2. Strict scrutiny of use of auctions of occupied spectrum, particularly when occupation is by small or private businesses which might suffer the effects of frequency relocation or limitation on future competitiveness.
3. A reduction in the emphasis on wide-area systems as the optimal method of operation, arising out of a recognition that small business does not possess the capital to construct across large areas, and that the designation of such areas is not necessarily market or competition-driven.
4. Equal treatment among like classes of operators in the application of agency policies to enhance the efficient use of spectrum, including availability of wide-band spectrum allocations to small business, equal inquiry of construction by licensees of wide-area or extended implementation systems, and equal application of the agency's application processing rules to avoid disparate treatment among licensees.
5. Strict scrutiny for the grant of extended implementation periods for large operators, while providing more liberal policies for small operators which require additional time to finance construction.
6. No spectrum policy should ever be created which relies on small operators combining to meet necessary criteria for participation. If such combinations are not required of large operators to take advantage of a licensing opportunity, such requirement should not be imposed on small business. This requirement creates a barrier to entry by demanding that small businesses must agree on a joint business strategy, which adds greater uncertainty and loss of individual control.
7. The Commission should give greater recognition to the investments made by small business incumbents, to provide unfettered opportunities for such small firms to grow and thrive naturally, even within an auction environment.

## **AGENCY RESOURCE ALLOCATION**

For years the Commission has wrangled with the members of Congress over the agency budget. Tens of millions of dollars here and there have been written onto and stripped from the agency budget, depending on the political winds of the day. Each year the agency accepts the

budget, then must determine what services it is capable of delivering within the constraints of its own finances. In determining how to spend its limited resources, the agency has had to make hard choices. Some of these hard choices have added to the barriers to entry for small business and continue to discourage investment today. SBT will examine some of these areas in an effort to assist the Commission in recognizing the effects of its past and present decisions.

## **Enforcement**

The dynamics of the operation of small business, as discussed *supra*, requires certainty. A person who mortgages a house to enter the industry seeks certain assurances that the risk taken will net an expected reward, following the employment of honest industry. Yet often these rewards are reduced due to improper actions taken by competitors -- actions that are clear violations of the Commission's Rules but from which there is no immediate relief.

For example, one SBT member has had pending before the agency an interference complaint for over three years. The complaint has still not been decided with finality by the agency. Other members speak of unconstructed systems licensed to large competitors for years, which condition has been reported to the agency repeatedly, without result. Another member has participated in litigation before the Commission, the locus of the claim being that the operations of a given carrier are outside the scope of the Commission's rules and said illegal operation is not denied by the opposing party. Yet the Commission has urged settlement between the parties rather than simply issuing a ruling on the obviously illegal and harmful

operation.<sup>22</sup> This case is particularly strange considering that any urged settlement would require the injured licensee to, in effect, forgive an ongoing violation of the Commission's Rules.

These examples, and the many more like them that occur each year, demonstrate a lack of resources and commitment by the agency to enforce its own rules. SBT herein states that the extreme uncertainty created by this condition stands as a distinct barrier to entry for many operators and a drain on the resources of existing operators who are made to suffer long and needlessly while awaiting some degree of justice.

Meanwhile, the Commission will find the resources to explore each new emerging technology, while it fails to devote the necessary resources to policing the existing licensees. SBT sympathizes with the overworked members of the Commission's Licensing Division in Gettysburg, who must contend with understaffing by qualified persons who possess the knowledge and expertise to decide and act on such matters. Nor is the situation any better in its Washington offices. Even simple matters languish, undecided, for months or years, awaiting a decision. Why?

It is not enough to state that the Commission does not possess the resources to hire additional personnel. What is often lacking is not only a lack of personnel, but a lack of commitment toward simply rendering a decision. It is an insufficient justification to state that

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<sup>22</sup> This matter has been pending before the agency, awaiting a simple decision, for over two years.

the rendering of a decision might draw appeal. Such is the nature of due process, which the Commission is bound to provide. What is required is a redirecting of resources to enable the Commission's staff to deal with the problems of today, while preparing for any future regulatory plan.

Nor should it escape the Commission's notice that many decisions rendered by the Commission do not comport with law. Decisions which overlook the basic tenets of the Commission's Rules, the Administrative Procedures Act, and due process occur daily.<sup>23</sup> The reason for these problems arises out of many factors, including the rendering of decisions by persons who possess no background in the practice of law. Accordingly, although these decisions are often well-meaning, the rulings reflect a basic misunderstanding of the rules of evidence, procedure, delegated authority, and the many other substantive and procedural elements of adjudication.<sup>24</sup> This fact creates greater uncertainty which adversely impacts small business in greater measure than large companies. It is rare for a large company to be dependent on the outcome of a single matter, however, the same condition is not uncommon for small business.

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<sup>23</sup> For example, on those rare occasions when a decision is rendered quickly, it is often too quick, not allowing for either opposition or reply prior to issuance. Obviously, the refusal to allow parties to respond to allegations and claims is wholly inappropriate. But such practice occurs with some degree of regularity.

<sup>24</sup> In many notable instances, the decisions rendered by the Commission's staff are an attempt to render an "engineering" solution to a legal problem. Operators become frustrated when their position is clearly based on the plain language of the Commission's rules, whereas the decision is based on a staff member's vision of what might work, regardless of the rules.

If the Commission is sincere in its desire to assist small business, it must redirect its resources to provide greater emphasis on enforcement and proper, timely decision making. Absent such a commitment, the Commission will continue its course of regulatory uncertainty, which adds unnecessary and unacceptable risk for small business operators, increases costs, and has on some occasions resulted in small business failure.<sup>25</sup>

SBT respectfully avers that the Commission's failure to allocate properly its resources, first to serve its primary duty to enforce its existing rules, then second, in the creation of new rules; has created substantial barriers to entry for small business. While a large corporation might be able to sustain the limbo created by dilitorious actions taken by competitors and regulators, small business does not have the luxury of simply devoting its efforts to other areas while awaiting a key enforcement decision. Small business opportunities are more limited and impediments to these opportunities arising out of the agency's repeated failure to act promptly on enforcement matters create enormous burdens, barriers and problems.

Nor should the Commission provide incentives to large business to circumvent the Commission's Rules. Couched in "waiver requests" and "extended implementation schedules" and the like, the Commission now tacitly invites large, well-financed businesses to find methods to create unequal application of the rules and their enforcement. It should surprise no one that these methods are often reserved to the richest members of the industry. For example, the 1991

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<sup>25</sup> See, e.g. Nu-Page of Winder, wherein Commissioner Quello in a concurring opinion lamented the delay in effective use of the Commission's resources in enforcing its rules.

Fleet Call, Inc. waiver was intended to support a single company's ability to license, finance and construct a networked SMR system throughout six of the largest U.S. metropolitan areas, costing in the tens of millions of dollars. Fleet Call swore that they had or could raise the money to bring this system to market and that all they required from the Commission was a longer construction time, combined with a waiver of the Commission's "forty-mile rule" to allow it to construct unloaded systems in greater proximity than was required for all other SMR operators. With these two concessions, Fleet Call stated that success could be assured.

Upon receipt of the Fleet Call request, the Commission was presented with three obvious choices -- accept, reject or accept a modified form of the request. The appropriateness of the Commission's response is dependent on viewpoint. For small business, grant of such a request would create an unequal playing field, providing advantages to a large competitor which were not available to competing, smaller entities. For that reason alone, the request would have been rejected by small business SMR operators. For larger concerns, acceptance meant another area of wild speculation in the bringing to the market an untested, but highly touted, service which would bring billions of investor dollars raining down on another segment. Since large business is motivated moreover by investment potential rather than service potential (except when the two occasionally merge) the support for the waiver was expected. For the Commission, it became a test to determine its role in encouraging emerging technology, while still demanding that licensees adhere to the existing rules in their development. It also marked a watershed moment in the Commission's discouragement of the continued development of small business and entrepreneurial efforts. Looking back, it is clear that the date the Fleet Call waiver became law



marks the day that the Wall Street genie was let completely out of the bottle.<sup>26</sup> Never before had the agency done so much for a single company to the obvious detriment of smaller competitors.

In its defense, the Commission has stated that any company which desired to operate a wide-area SMR system could have followed Fleet Call into the ESMR market. Yet, this kind of explanation rings hollow. It ignores the barriers to market entry that are attendant to being a small business. It assumes that a company with a net worth of one million dollars has the same alternatives as one which is selling billions of dollars in shares of stock on Wall Street to fill its coffers for construction, operation and development of such systems. It assumes a level playing field which simply does not exist and which is made more unlevel by a grant of forbearance in the enforcement of the Commission's rules to a large company, which already possesses market power due to size. Meanwhile, the Commission holds small companies to the more expensive, more time-consuming task of operating under the rules without advantage or "short cut."

There is more than a little irony in the fact that the companies which seek such concessions in these ways, base their need for these concessions on their inability to attract

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<sup>26</sup> The Commission has taken other actions which have provided advantages for single entities, such as extended implementation schedules for operators of 900 MHz systems; its attempt to shore up Radiodetermination Satellite Services; and its give-away of spectrum to create HDTV. All of these past actions can be viewed as failed attempts to bring a particular service to the market based on a class of operator's claim of financial backing which might be devoted to serving the public. In each instance, the Commission expressed its hopes and in each case the Commission has been disappointed in the results.